United States Court of Appeals

for the Second Circuit

PETITIONER'S REPLY BRIEF

74-1336

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FOR THE SECOND CIRCUIT

Nos. 74-1336 and 74-1495

LORENZ SCHNEIDER CO., INC.,

Petitioner,

—against—

NATIONAL LABOR RELATIONS BOARD,

Respondent.

ON PETITION FOR REVIEW AND TO SET ASIDE AND CROSS-APPLICATION FOR ENFORCEMENT OF AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD

REPLY BRIEF FOR LORENZ SCHNEIDER CO., INC.

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Summary of Argument in Reply

After years of fruitless litigation[1] by four distributors, to sustain a sale of routes by the Company ("Schneider") to them, over the objections of their union, Local 802, Teamsters ("Teamsters"), Schneider bargained for and exercised its Teamsters'-granted contract right (364a-365a) to sell its distribution routes and transform those employees who so chose into independent business men.

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[1] *Chupka et al.* v. *Lorenz Schneider Co.*, 34 Misc.2d 123, 226, N.Y.S.2d 662, aff. 16 A.D.2d 938, 230 N.Y.S.2d 672, appeal dism. 12 N.Y.2d 1, 233 N.Y.S.2d 929, 186 N.E.2d 191, mot. den. 12 N.Y. 2d 757, 186 N.E.2d 561, appeal dism. 83 S. Ct. 679, 372 U.S. 227, 9 L. ed.2d 714.

Although the Board has heretofore[2] given effect to such intention, it has here nullified the sale transactions by its ruling that the purchasers are employees. Thereby, men who refuse to be employees (255a)[3] and who invested an average of $20,000 of capital to emerge from the employee class and become business men[4] are, by administrative ukase, forced into an unnatural and unwanted employee relationship with Schneider.

The Board's ruling disregards, as we shall show, judicial and its own precedents, because of a fundamental misconception that misled it into error, namely, the notion that asserted grievances of whatever nature are a proper subject for Board jurisdiction. The Board overlooked the fact that the grievances complained of were those that generally arise between sellers of snack foods and not employees and employer.

It is a most extraordinary thing for men who have invested large sums of capital to seek the status of employees and the Board appeared the readier on that account to reach out to grant them employee status. Unlike the Courts,

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[2] *Cement Transport, Inc.*, 111 NLRB 175-9, where the Board said: "We believe, in view of the evidence, that there was here a specific intention on the part of the Employer, conveyed to and understood by the owners, that an independent contractor relationship be created respecting the operation of the leased tractors. In our opinion, such intention was accomplished." *Cf.* also: *Eldon Miller*, 107 NLRB 557; 103 NLRB 1627; *Oklahoma Trailer Convoy, Inc.*, 99 NLRB 1019, 1023.

[3] Thomas Judge, a distributor witness for the Independent Routemen, testified (255a): ". . . I said [to Schneider's receptionist] I had come . . . about purchasing a route. She [the receptionist] handed me an employment application. I said, 'I do not want a job. I want to buy a route.'"

[4] The Court in *Chupka, supra*, quotes the former employees as asserting, 226 N.Y.S.2d at 666: ". . . if deprived of their routes [the former employees] may never again have the opportunity of engaging in business for themselves".

the Board was not at all suspicious of the motives[5] of business men seeking labor union status for the Independent Routemen's Association ("Independent Routemen") and, baffled by the inescapable fact that these business men completely control their businesses,[6] the Board resorted to a strained and perverse interpretation of irrelevant indicia having no probative or juridical significance on the question of who controls the details of the distributors' work and built on them a conclusion that contradicts its own finding that the distributors control the details of their work.

The Board seems not to have considered that Schneider has a real and continuing interest in the results to be achieved by reason of its franchise obligations to the manufacturers to preserve and promote the brand names of their products by point of sale advertising among other means, its contract obligations to its distributors to preserve the franchise for their common interest, its interest

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[5] Warren Klaus, an official of the Independent Routemen, and an original Schneider employee who consulted for six months with an attorney (244a) and was attended by that attorney (241a) at the purchase of his route, implies (238a) that he made a bad deal and repents of his bargain. However, as we show *infra* at pp. 16-22, the motivation is somewhat more sophisticated and ambitious than the mere undoing of a supposed bad bargain, and seeks no less than the benefits of business men with the immunities of labor unions.

[6] Perhaps the most persuasive evidence of Schneider's lack of control is found in the testimony of the same Warren Klaus (253a):

> "Q. [By Schneider's counsel] Since 1967, since these contracts were [made with Schneider] does the DR man . . . ride with you, has he ridden with you when you have not granted permission for him to ride with you? A. No.
>
> Q. Prior to 1967 did your supervisor ride with you without requesting permission? A. I had no say. Of course he rode with me."

in seeing that the contract obligations of the franchises are observed and fulfilled; and a common interest in the success of the distributors because of the unpaid balances due on those purchase contracts not made for cash. Moreover, the Board seems to have confounded Schneider's actions in pursuance of these aims—activities that have nothing to do with the details of the distributors' routine (154a)—with the details of performance, and has here characterized as impermissible employee control what it has elsewhere[7] correctly described as permissible observation. The Board has, also, disregarded the necessary cooperation required of franchise operations and has failed to distinguish suggestions (which the distributors can disregard (219a)) and exhortation for cooperation[8] and cautions against

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[7] *Nehi Bottling Co. Inc.*, 101 NLRB 68.

[8] *Nelson-Ricks Creamery Company*, 89 NLRB 204, where the employer scheduled the arrivals of the drivers, requested they conform to schedule, suggested routes, gave directions to serve customers who found regular driver objectionable and had a field man who, with drivers, solicited new business. *Cf.* also: *Spickelmier Company*, 78 NLRB 452, 455; *Oklahoma Trailer Convoy, Inc.*, 99 NLRB 1019. In *Oklahoma*, the "lease-contract" between the employer and truck owners requires the owners "to comply with the Employer's instructions with relation to the manner and method of caring for and handling the traffic transported"; the drivers who are not truck owners, while hired in the first instance by the owners, must be approved by the employer; the employer maintains a road patrol which can take a driver off the road if his driving is not satisfactory; and no passengers are allowed on the truck without the written permission of the employer. It was held (p. 1022): "While the Company has reserved and exercised certain control over the work of the owners and their drivers, such reservation and exercise of control have been directed essentially to the end to be accomplished, namely, the delivery of trailers in conformity with the rules and regulations of the Interstate Commerce Commission, and are not inconsistent with the independent contractor relationship," citing *Greyvan Lines, Inc.* v. *Harrison*, 156 F.2d 412 (CA 7), affirmed sub nomine *U. S.* v. *Silk*, 331 U.S. 704.

violation of the anti-trust laws[9] from authoritative control. Generally, it is fair to say that in torturing these business men into an accommodation with its Procrustean bed, the Board has so completely departed from its own standards and previously established criteria, and its own distinction between means and ends, as to render those standards valueless.

And notwithstanding the finding (404a) that the distributors control the details of their work and receive no wages, and as General Counsel concedes (p. 16) are not supervised in their day-to-day operations, the Board has directed (474a) Schneider to bargain with the Independent Routemen about wages, hours and conditions of employment. It is fair to assume that the Independent Routemen did not form an association, and agree to pay a lawyer's retainer fee of $10,000, to bargain about wages and hours that they alone control. Their objective is disclosed in what, at first and superficial glance, appears to be the remarkable purpose of negotiating for "territories"[10] (264a), as enu-

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[9] The General Counsel is in error in stating that the distributors' contracts required distributors to grant discounts and rebates "on the same basis as solely determined by [Schneider]" (p. 16). The provision (308a) mentioned obviously refers to laws forbidding price discrimination and requiring uniformity in discounts and rebates to those retailers "who earn the same."

[10] The General Counsel is ambivalent and appears to be confused on this point. At one place (p. 16) he complains and cites as an example of employee control, that the contract requires distributors to use their best efforts to promote Schneider's products "without regard to their own [distributors'] fixed territory." The implication plainly is that the absence of a territory with geographical boundaries is impermissible control. At another place (p. 21), the General Counsel complains that the agreement "precludes distributors from soliciting business outside the area serviced by [Schneider]." In respect of this latter complaint, the General Counsel appears to have overlooked, first, that Schneider has no right to authorize sales outside its franchised area, and, more importantly, that Schneider's franchised area comprises the five bor-

merated in the Independent Routemen's charter, together with their discontent at the restraint imposed by the anti-trust laws (276a). The plainly forseeable consequence of permitting the Independent Routemen to garb itself in the robes of union immunity is to create a monopoly and restrain competition between business men.

In struggling to extricate the Board from its quagmire of error, the General Counsel perpetuates the Board's errors and dredges up from his storehouse some of his own, without regard to logic, consistency or, we regret to have to say, accuracy. Although he makes no objection to our Statement of the Case, he offers a Counter-Statement, into which he has, no doubt through lack of familiarity with the facts, permitted numerous inaccuracies to creep.[11]

The issue here is whether, as we contend and General Counsel denies, the Board has failed to apply correctly the applicable law and follow the judicial and Board precedents. The General Counsel relies on the authority of the Supreme Court[12] and of this Court[13] to sustain the Board's determination.

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oughs of New York City and Nassau and Suffolk counties, which, at last count, had a combined population of 10,451,431 persons, made up as follows: Manhattan, 1,539,233; Kings, 2,602,012; Queens, 1,987,174; The Bronx, 1,471,701; Richmond, 295,443; Nassau County, 1,428,838; and Suffolk County, 1,127,030.

[11] One such error (p. 16) twice repeated (p. 21) is that "the contract . . . each distributor signs is not negotiated by him, but has terms unilaterally set by the Company" (p. 21). The testimony of the Independent Routemen's officer and witness (241a, 244a, see footnote 5, page 3, *supra*) completely refutes this. It would unduly divert us from the substantive issues to deal with each such inaccuracy but enough appears to suggest caution in accepting the assertions of the Counter-Statement. We shall rely on the contrary assertions of our Statement to correct the errors that were made.

[12] *N.L.R.B.* v. *United Ins. Co.*, 390 U.S. 254 (1968).

[13] *Herald Co.* v. *N.L.R.B.*, 444 F.2d 430 (CA 2, 1971), cert. den. 404 U.S. 990.

We have no quarrel with the holding of those cases that in borderline cases, when different factors point in opposite directions the Board must determine which outweighs which, and that on appeal the Court will not substitute its judgment for the Board's.

This, however, is not a borderline case. Moreover there is not here, as in those cases, a Board finding on controverted evidence that the Employer controlled both the means and the end of performance. And there is not the slightest resemblance between the fact situations in those cases and that at bar.

Unlike the cited cases there are factors here establishing independence that are completely inconsistent with employee status. And also unlike the cited cases, there are no factors that are inconsistent with independent status. And we do not rely upon any controverted facts resolved against Schneider, but entirely on the facts disclosed by the record and found by the Board.

We submit that had the Board followed precedent, its conclusion, conformable to its findings, would have correctly adjudged these distributors to be independent business men.

The General Counsel insists that our perception of Board inconsistency is "wholly illusory" (p. 24). We have here assembled a number of cases closely resembling this case in all of which the persons affected were adjudged independent, and not one of which is as strong for independence as the case a bar, and which, we are certain, will establish the reality of our perception of Board inconsistency.

ARGUMENT

POINT I

There are factors here that are peculiar to an independent business venture and completely incompatible with an employee relationship.

Following the 1947 amendment, the Board[14] acknowledged the Congressional intent[15] that the term "employee" be given its conventional dictionary meaning of someone who works for another for hire under direct supervision and not one who invests his capital in order to receive profits. Unhappily the Board has here permitted itself to relapse into pre-amendment habits.[16]

(a) ***The Capital Investment***

The distributors here with the specific intention of engaging in business for themselves have purchased distribution franchises together with certain tangible personal property, some for cash, some on conditional sales contracts with minimum down payments of approximately $5,000, at an average cost of $20,000. The good faith of the sale transactions has not been questioned, and the contracts of purchase are valid and represent legally enforcible contracts for the sale of property under which the purchasers have taken possession.[17]

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[14] *American Factors Company*, 98 NLRB 447, 448-9; *Oklahoma Trailer Convoy, Inc., supra; J. Howard Smith, Inc.*, 95 NLRB 21; *Spickelmier Company*, 83 NLRB 452.

[15] *N.L.R.B.* v. *Steinberg*, 182 F.2d 850, 854.

[16] Cf. *Universal Camera Corp.* v. *Labor Bd.*, 340 U.S. 474.

[17] Cf. *Chupka, supra*, at 932-33 of 233 N.Y.S.2d.

A conventional meaning of employee does not include one who ventures his capital for the opportunity of marketing at his own risk the products of another.[18] With that view, an Administrative Law Judge trying a case between Schneider and the Independent Routemen evidently agrees.[19]

(b) *Entrepreneurial Interest*

Here, the Independent Routemen have the opportunity and are called upon to make all the decisions resulting in profit or loss that only a businessman can. Beginning with the initial decision of whether he wishes to invest approximately $20,000 to go into business for himself, he must decide whether to buy or rent a truck, where to garage it, whether to lease or provide his own warehouse, what schedule of work he will follow, whether to do the work himself or hire others, what he should do about expanding his business by capturing some of the 10,000,000 prospective customers in his hunting preserve, whether to invest

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[18] *U. S.* v. *Silk*, *supra*. In *Silk*, decided before the 1947 amendment on the broader definition of "employee" inspired by the "economic reality" theory abolished by Congress, found the drivers there to be independent contractors notwithstanding controls that included a manual of instructions that ". . . purported to regulate in detail the conduct of the truckmen in the performance of their duties" (p. 709 of 331 U.S.), the Court held (p. 712) that the distributor who undertakes to market at his own risk the products of another cannot be said to have the employer-employee relationship.

[19] After noting that the distributor there involved had purchased his route for $17,800, the Judge said:

> "As a rule employees do not pay $17,800 to obtain a job with an employer. Hence it may be that, as Respondent contends, a routeman was not an employee but resembled an independent contractor. But I am bound by the Board's prior ruling that routemen are employees."

Decision of Administrative Law Judge James V. Constantine in NLRB Case No. 29-CA-3689, August 20, 1974, p. 10.

in excess quantities of products at the promotion intervals to be resold at the higher price when the promotion is ended, whether to supplement his stock with items other than those sold by Schneider and a host of other matters that enabled Schneider, which, at the inception of its business, confronted similar problems, to grow from a single truck operated by its proprietor to its present dimensions.

Can it be said that employees are called on to make such decisions for themselves?

(c) *Right to Delegate Work*

Another factor here that is inconsistent with the employee status is the distributor's right at his sole election to do his work himself or hire others to do it. The Board has found that these Independent Routemen have and exercise that right and the record (331a) discloses that multi-route operations and operation of routes by corporations are expressly contemplated.

As the principle of the maxim *delegatus non potest delegare* is understood to apply to a servant, it follows that if the person employed is not expected to do the work himself, he is not a servant.[20] On this point, as on others, although the Board carefully followed *Greyvan* in other cases[21] it failed to do so here.

(d) *The Internal Revenue Ruling*

Another factor present here that is inconsistent with employee status is the formal Ruling (454a) of the Internal Revenue Service that these same distributors are not

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[20] In *Greyvan, supra*, at pp. 415, 416 of 156 F.2d the Court said: ". . . we think it cannot be said that a truckman to whom is left the determination of whether to do the work himself or engage others to do it is a mere employee."

[21] *Oklahoma Trailer Convoy, Inc.*, footnote 16, *supra*.

employees. The General Counsel contends (p. 26) that the status of the distributors under the tax laws is not determinative of their status for labor relations purposes. The General Counsel is mistaken. *Silk, supra,* and *Greyvan* which the General Counsel is fond of citing elsewhere,[22] arose under the Social Security Act and the related taxing statute and involved, as here, a question of status under a federal statute. Moreover, the Board has expressly recognized[23] the anomaly of contradictory rulings by different administrative agencies and has not hesitated to give weight to State administrative decisions.[24]

The General Counsel makes the specious argument that the Board determination was based on a record developed after a hearing and that the IRS Ruling (the "Ruling") is based on written forms. The Ruling is, if anything, entitled to more weight, in the circumstances it was rendered, than it would otherwise be. While, in theory at least, both are non-adversary (208a) proceedings, the IRS was not hindered as was the Regional Director's hearing by a counsel who openly proclaimed (138a)[25] his intention to confuse the proceedings, and boasted (140a-141a)[26] that when he finished making speeches there would be enough to ruin Schneider's case. In the event, he was proved a prophet.

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[22] And on which the General Counsel leaned heavily in *Herald, supra* (p. 51 of Government's Brief in *Herald*) and elsewhere, but which, for understandable reasons, he fails to mention here.

[23] Cf. *N.L.R.B.* v. *Steinberg, supra.*

[24] *Nelson-Ricks, supra,* at page 206.

[25] The Independent Routemen's counsel: "If we clearly understand the page I'm referring to—and from here on in they'll all have numbers on the bottom, consecutive from the number 1, which should be number 3; and if it isn't confusing enough, I'll make it even more confusing."

[26] "Mr. Dicker [Schneider's Counsel]: We have more speeches than we have testimony, Mr. Kendellen [hearing officer].

(footnote continued on next page)

There is no advantage in the Regional Director's hearing because, in the first place, the Regional Director made his decision from the transcript. In the next place there were no controverted fact issues requiring resolution and from the greater number of distributors questioned by the IRS it would appear that theirs was the more comprehensive inquiry.

Finally, unlike most applications for Rulings that are made unopposed, this application was submitted under impressive adversary advocacy of the Board ruling which, at the least, served as a caveat to IRS against error. It is manifest that the Board decision summarized all that it considered unfavorable to Schneider's contentions in the transcript and set forth all the arguments in favor of employee status it could find. The findings, as distinguished from the conclusions, are essentially the same. The opposite determination by the IRS is, therefore, all the more impressive.

(e) *Schneider's Relinquishment of Control*

Finally on this branch, we have the fact that Schneider has relinquished,[27] as indeed it had to, every vestige of control that it ever had. Unlike *N.L.R.B.* v. *United, supra,* where the nature of the employment rendered it impossible for the employer to control the details of performance,

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"Mr. Rosenberg [Independent Routemen's Counsel]: That's all right. There will be enough there to ruin your case.

"Hearing Officer: Let's not try the case this way any further, Mr. Rosenberg."

[27] Schneider apparently could not enforce payment for unwanted shelving (240a) and it was obliged to tell Bohack Stores that it could do nothing about a distributor caught stealing because the distributor was an independent business man who owned the stop (161a).

in a business of this nature it is vital that the equity owner of the business should closely control such details, as Schneider formerly had done and now urged (331a, par. 9) its distributors to do. In the circumstances, it is a factor peculiar to independence that the distributors should have the freedom that the Board found they have here, and it is entirely inconsistent with the employee relationship.

POINT II

There are no factors here inconsistent with independent status.

The object of the 1947 Congressional amendment was to reduce uncertainty and variability and to give the courts the power to reverse an obviously unjust decision.[28] We have already given some indication of the variability of the Board's decisions on the positive factors of independent status and propose here to deal with the negative side.

The General Counsel has fired a broadside of miscellany that includes irrelevancies and perverse conclusions[29] that have no juridical or probative value.

We shall deal here with the substantive matters which it is claimed constitute impermissible control and depend on the other Board decisions we cite, where the trivia raised here were ignored or rejected, to dispose of those.

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[28] Sen. Taft, 93 Cong. Rec. 3839.

[29] One example is the conclusion that Schneider controls the distributors because, after being refused permission to ride with the distributor, the person who was refused was encountered in a store the distributor had lately visited (242a). The normal deduction from such evidence, it seems to us, would be that Schneider lacked control of the distributor. For clarification of others of the Board's misconstructions we respectfully refer to the affidavit of Schneider's President (444a-451a).

In determining status, the Board previously has emphasized three factors: (1) the entrepreneurial aspects of the dealer's business including the "right of control"; (2) the risk of loss and opportunity for profit; and (3) the dealer's proprietary interest in his dealership.[30]

In a much more restricted relationship[31] than here, the Board held as sufficiently meeting the entrepreneurial standard for independence that the drivers' earnings depended in large measure on their own diligence in the efficiency of their itinerary, the avoidance of breakdowns of their equipment and their ability to obtain new customers. This, notwithstanding, as we previously (p. 4, footnote 8) noted, factors there that the Board has here held determinative of employee status.

At bar it was held that the distributors were "supervised" and that they were therefore controlled. The word supervise has a definite connotation of control, according to lexicographers, and is, in addition, a term of art that clearly means control.[32] We have previously urged that the Board was using the term "supervised" as a synonym for observation, as, indeed, the Board's decision in *Nehi, supra,* illustrates. In the cited case, the Board said (p. 68):

> "Two [Company] expediters Ziff and Clementi work under the supervision of Herman Cohen [Employer's Corporate Secretary] and make sales, solicit new customers, keep records of their sales, and report to Cohen their observations [in *Schneider* called supervision] of the performance of distributors. They ride with distributors or with the utility driver, or themselves drive. Occasionally, they help load the beverages. . . . All three are paid bonuses based upon their quotas of sales . . ."

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[30] *Brown* v. *N.L.R.B., supra,* p. 703.

[31] *Nelson-Ricks Creamery Company, supra.*

[32] §2(11) Taft Hartley Act, 29 USCA §152(11).

Where here, the Board has held that activities not quite as restrictive are impermissible control of the means, in the cited case the Board held (p. 70):

> "Each distributor must perform under his contract to the satisfaction of the Employer. The record shows, however, that the Employer's control extends only to results to be achieved under the contract, not the means used. Upon the entire record, we find . . . that the distributors are independent contractors . . ."

We consider that we have sufficiently refuted the General Counsel's assertion that our perception of Board inconsistency is an illusion.

POINT III

The General Counsel is mistaken in asserting (p. 13, fn. 7) that Schneider has dropped its contention (p. 3, fn. 5, 443a) that Independent Routemen is a trade association of business men intent on creating a monopoly and evading anti-trust laws, and is not a labor union.

The General Counsel's mistaken assertion (p. 13, fn. 7), his refusal to concede the expressed[33] intention to create an independent contractor[34] relationship, and his remarkable insistence (p. 17, fn. 10) that there "is simply no

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[33] General Counsel apparently sees no inconsistency in disregarding as "self-serving" (p. 17, fn. 10) the *mutually* declared (298a) intention to create an independent contractor relationship, while accepting as conclusive, the *unilaterally* stated charter purpose (264a) to negotiate wages, hours and conditions of employment in contradiction of the record disclosure (*cf.* 348a) and the Board finding that the distributors receive no wages and control the conditions of their work.

[34] We continue as heretofore to employ for the business men here involved the term "independent contractor" as the conventional antithetical term to "employee."

evidence that the distributors knowingly relinquished 'employee' status in accepting the Company-initiated changes in 1967", (and, presumably, that it took five years (439a) to discover they are not employees) obliges us to reply.

We have heretofore (p. 2, fns. 3, 4,) demonstrated that it was the aspiring ambitious employees whose litigation initiated their emergence from employee status, and that all concerned had a real awareness that they were not paying large sums to engage, at their own risk, in an occupation they were previously paid to pursue without risk. We shall now demonstrate that none of these men regard themselves otherwise than as business men and that they have no intention of renouncing their status.

Conformable to the title of their organization, Independent Routemen Association, their charter (265a) explicitly restricts membership to " . . . persons or firms or corporations engaged in the sale and distribution of confectionary and food products . . . " Their initial meeting was addressed by their lawyer who told them " . . . about his other clients in the same or similar business" (277a). And their agreement to pay a legal retainer fee of $10,000 (278a), we may presume, was not induced by a desire to revert to employee status and to secure bargaining rights[35] concerning hours, wages and conditions of employment that the distributors alone control. That this is so appears from the statements[36] of two distributors, former Independent Route-

[35] Labor Union status was accorded Independent Routemen on the grounds that it is composed of employees (378a) and its professed object is " . . . negotiation in regard to wages, hours, territories, working conditions, commissions, fringe benefits, and all matters pertaining to the earnings, tenure and retirement, sickness and other rights of employment. . . . "

[36] These statements and the opposition letter, filed in connection with Schneider's application, denied by the Board (465a, fn. 2) to reopen the hearings, to prove the true nature of Independent Routemen, are hereto appended as Appendix "A."

men members, present at the meeting, who report that the distributors objected strongly to becoming employees and were assured by their lawyer they would remain business men through a "gimmick" that would induce Schneider to negotiate. The minutes of that same meeting (277a) tell us what that "gimmick" is. After telling the meeting about his other clients in the same business, the lawyer "went on to tell about a ruling given by the [Board] on the Tropicana suit" (277a). This suit,[37] it would appear, is the "gimmick" and it was surely calculated that by following the tactics there employed, with the threat, or first appearance of, pickets, Schneider would capitulate. These proceedings are the consequence of that miscalculation.

It is worthy of note that in pursuit of their objectives the Independent Routemen did not seek out the Teamsters[38] which had, for so long, fought against the sale of the routes, whose members are still employed by Schneider and with whom they could have made common cause in achieving legitimate labor union objectives more effectually than they can without labor union aid and without payment of a $10,000 retainer.

Also illuminating are the objectives sought and grievances expressed by the Independent Routemen. Inconspicuously tucked in with the wages, hours and conditions it professes to be interested in negotiating, appears the

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[37] *Culinary Workers Local 62 and Tropics Enterprises Inc. d/b/a Tropicana Lodge* (1968), 172 NLRB 419. The organizations there involved engaged in picketing for successive 30 day periods without, in the first instance, a petition being filed, and first wanted to require recognition and compel bargaining without being certified as the statutory representative; unfair labor charges filed against it on account of such conduct were dismissed by the Board.

[38] This is especially remarkable in "employees" who did not, as General Counsel wants us to believe, "knowingly [relinquish] 'employee' status. . . ." (p. 17, fn. 10).

word "territories" (264a) which is really what all this is about.

The chief complaint of the distributors results from the restraints of the market place and of the antitrust laws that force them to satisfy customers and avoid price discrimination in compliance with law. With exclusive territories, complaining customers would be at the mercy of the territory distributor for products their customers demand (257a).[39] That this is the true purpose of the Independent Routemen is evident from their stated objective of negotiating for territories, a drastic curtailment of their present unlimited territory. Other non-assenting distributors, for whom Independent Routemen is the enforced bargaining agent, would be obliged to accede to the pressures of the Association, and, in disregard of the existing contracts, the Independent Distributors would inevitably claim that employees should not be obliged to buy their jobs (*cf.* p. 9, fn. 19, *supra*) and demand the refund of the purchase prices that were paid. This glittering prospect helps explain why distributors who so vigorously protest small expenditures for display stands that chiefly benefit them, so readily have agreed to pay a lawyer's retainer fee of $10,000.

The Board has, among other things, overlooked that there is not here involved, nor can there be, any controversy over

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[39] Thomas Judge, a distributor, testifying for the Independent Routemen:

> ". . . I went to the store . . . and the whole snack section was being altered. . . . I approached the manager, and he was aware of my position and not paying for the racks, and he told me, 'Tom,' he says, 'I don't care who delivers the merchandise. This store must have Wise Potato Chips in the store. I don't care who delivers it.' "

It appeared (258a) on cross-examination that the racks were installed by an employee of the manufacturer and not Schneider.

wages or hours, or other terms and conditions of employment.[40]

For reasons similar to those that determine there is no labor dispute, the contention that Independent Routemen is a bona fide labor union must be rejected.[40] Independent Routemen is a trade association of retail merchants and not a *bona fide labor union* within any reasonable interpretation of that term.[41]

The courts have always been alert to distinguish, as the Board has here failed to do, between legitimate labor unions and attempts by businessmen to effect monopolies and otherwise illegally restrain trade under the cloak of labor union activity.[42]

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[40] *Columbia River Co.* v. *Hinton*, 315 U.S. 143 (1942). The Court there said (pp. 146, 147):

> ". . . But the statutory classification, however broad, of parties and circumstances to which a 'labor dispute' may relate does not expand the application of the Act to include controversies upon which the employer-employee relationship has no bearing. . . .
>
> The controversy here is altogether between fish sellers and fish buyers. The sellers are not employees of the petitioners or of any other employer, nor do they seek to be. On the contrary, their desire is to continue to operate as independent businessmen, free from such controls as an employer might exercise. . . . For the dispute here, relating solely to the sale of fish, does not place in controversy the wages or hours, or other terms and conditions of employment, of these employees."

[41] *People* v. *Masiello*, 177 Misc. 608, 31 N.Y.S.2d 512 (Sup. N.Y. 1941).

[42] *Conley Motor Express, Inc.* v. *Russel*, 86 LRRM 3009 (July, 1974, 3 Cir.); *Peo.* v. *Masiello, supra; People* v. *Distributors Division, Smoked Fish Workers Union, Local No. 20377*, 169 Misc. 255, 7 N.Y.S.2d 185; *U. S.* v. *Fish Smokers Trade Council, Inc. et al.*, 183 F. Supp. 227 (U.S.D.C. S.D.N.Y. 1960). In the last cited case, the Court said (p. 35):

> "The demands . . . by the Union . . . —excepting perhaps that concerning the welfare and pension fund—were purely the demands and requirements of an independent businessman having to do with extension of credit, price and discrimina-

We conclude this branch of our reply with a quotation from the decision in *People* v. *Distributors Division,* as follows (pp. 185, 186 of 169 Misc. 255):

> "The evidence, however, convinces me that the Distributors Division is not a bona fide union of laborers or workingmen, but merely an aggregation that has taken on the guise and nomenclature of a union in order to obtain an immunity to carry on its activities as an illegal combination to restrain trade and create a monopoly. It was established that the membership of the Distributors Division consisted of merchants engaged in the business of buying and selling smoked fish."

And again (p. 187):

> "Labor unions are organizations of employees. Employees are those who are compensated for their labor or services by wages and are not paid by profits. Although both the laborer and the entrepreneur may toil equally, the economic and social difference between them lies in the method of compensation and return for their toil. One is paid a wage or salary; while the other must look to prospective profits for his remuneration. The Distributors Division is a typical jobbers association. It is not interested in the classical purposes of a labor union, namely: furthering the interest of the worker with respect to higher wages, improved labor conditions, bettering hours of labor, etc. Its interests lay solely in striving to obtain more retail trade or customers for its members so as to increase their profits."

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tion, and not with wages, working conditions or hours of employees. . . . That they were not bona fide members of the Union is further evidenced . . . that [the decision to strike was put to the union membership] . . . they were not even consulted about it. . . . "

Here, we note that after the distributors bought their routes, they did not join a strike called by Teamsters (86a).

POINT IV

This case is in every respect stronger for independent status than the recently decided *Gold Medal* where the Board determined the distributors to be independent contractors.

We have heretofore dealt with the features in this case which place it beyond the conventional definition of employee and which under applicable judicial and administrative law, disregarded by the Board, establish independent status. We now deal with the most recent, if not the most dramatic, example of Board inconsistency, the Board's failure to follow *Gold Medal,*[43] decided six months before the Decision on review here.[44] The General Counsel's denial of Board inconsistency invites a comparison of the two cases.[45] We shall here deal only with the essential features of *Gold Medal* that incontrovertibly establish the Board inconsistency and leave for oral presentation a more detailed analysis. First we dispose of the Board's claimed (398a) distinctions between the two cases.[46]

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[43] *Gold Medal Baking Co., Inc.*, 199 NLRB No. 132 (1972), 81 LRRM 1356.

[44] Unfortunately, the Regional Director's decision here was rendered three weeks before *Gold Medal* was decided and he did not, therefore, benefit by the views there expressed.

[45] We here include, for the convenience of the Court and General Counsel and to facilitate comparison, as addenda, copies of the Regional Director's (Region "B" Four) and the Board's decisions, and a copy of the Gold Medal distributor's contract, Exhibit 1 in the record of that case. These are appended as Appendix "B".

[46] "In marked contrast, here, [Schneider] . . . effectively controls the prices at which . . . distributors resell to retailers, most of which are chain stores; it requires compliance with a 10-page booklet entitled, 'Procedures for Operating Independent Distributor Routes'; and it employs distributor representatives who in a number of ways . . . oversee the operations of the distributors." (398a-399a).

As to the first of these distinctions, the control of prices, the Regional Director has here found (408a) ". . . while the distributors may set their own prices to independent customers, it is clear that the prices can vary only by a few cents . . ."[47] In this penny business, a variation of a few cents can amount to a 5 to 20% change in the sales price (450a) and the limitation, obviously, is not one imposed by Schneider.

So far as the 10-page booklet[48] is concerned it would seem to be a sufficient answer that rules purporting "to regulate in detail the conduct of truckmen in the performance of their duties"[49] and rules far more restrictive[50] were held by the Supreme Court and the Board to be consistent with independent status.

This brings us to the final claimed distinction, the activities of the distributor representatives. We have previously

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[47] The Board, contrary to the undisputed record (53a) evidence mistakenly states (398a) that most of the retailers are chain stores; the fact is (53a) that the chain routes comprise 40% of the retail outlets and of those chain distributors, those testifying acknowledged (210a, 219a, 230a, 247a, 251a, 254a) having mixed routes that include independent stores.

[48] Although the Board says that only "some" of the provisions are hortatory, the only example given of a claimed mandatory clause is Provision 22 which the Board misreads as Schneider's requirement that stores be served once a week. Properly read in context, it is obvious that the requirement for such service is there given as one of the things that must be done to sustain the continued good will of customers (336a). This reading is reinforced by clause 12 (332a) where weekly service calls are described as a MUST "to obtain your maximum volume and retain your display places in the store". The purely hortatory nature of this booklet is demonstrated by the testimony (230a) of one distributor that he does not recall ever receiving a copy, and by the evidence that the chain distributors have mixed routes notwithstanding that the booklet recommends (342a) against mixed routes.

[49] *U. S.* v. *Silk, supra* (p. 709 of 331 U.S.), page 9, fn. 18, *supra.*

[50] *Nelson-Ricks Creamery Company, supra; Oklahoma Trailer Convoy, Inc., supra,* page 4, fn. 8, *supra.*

demonstrated (p. 14, *supra*) that greater and more restrictive activity was, in *Nehi, supra,* approved as permissible observation relating to the ends achieved and compatible with independent status.

We come now to *Gold Medal.* It is axiomatic that the right of control is co-extensive with the contract rights, and to determine what these are we must examine the contracts. Before doing so, we call attention to some fundamental differences between this case and *Gold Medal.*

First and foremost, unlike *Gold Medal,* the distributors here purchased, at an average cost of $20,000 the customers comprising their route, with the right, exercised here,[51] to buy and sell such customers. The truck and other equipment were purchased or leased at additional cost.

In *Gold Medal* the only distributor investment was in the trucks, the distributors having been granted, without cost, the right to receive the earnings from the customers, who remained the property of Gold Medal.

A second difference consists of the method followed in the respective cases, of converting from an employee operation. Here, Schneider bargained for and obtained explicit Teamster approval for a sale to and change of status of the employee members of Teamsters. In *Gold Medal* the employer and the Union initially bargained, for a considerable time, on the evident understanding that the Union there would continue to represent the distributors after the change in operation.

Other substantial differences appear from the Gold Medal contract provisions, as follows:

The Gold Medal contract gives the routeman exclusive distribution rights of Gold Medal's products with regard

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[51] Independent Routemen's officer and witness Warren Klaus testified (251a) that he sold off some stops for $6,000.

to specified customers (1 and 2);[52] these customers are referred to as *Gold Medal's* customers (1, 3(a), 8, 16 and 18(d)); each routeman's customers are confined to a limited geographic territory. Gold Medal requires routemen to service additional customers specified by Gold Medal (9); customers must be serviced "properly and with due diligence." Any routeman who causes the loss of any Gold Medal customer is in default of his agreement. Gold Medal has the absolute right to terminate the agreement upon such default (18(d)); in the event of illness or emergency, the routeman must provide someone to service the route. Gold Medal reserves the right to do so at the routeman's expense if he fails (17); routemen are obligated to purchase Gold Medal products at Gold Medal's established prices (3(a) and 4); a routeman cannot purchase any products similar to Gold Medal's from other sources (12); a breach of this provision is cause for termination. Products not produced by Gold Medal may be purchased elsewhere only on written permission of Gold Medal (6); routemen cannot sell or assign their routes without prior written approval of Gold Medal; the purchaser must enter into an agreement similar to that of the selling distributor (12); Gold Medal must approve exchanges of customers between routemen, and they are forbidden to accept money therefor (21); Gold Medal has the absolute right to terminate the contract on one week's written notice for failure to faithfully perform any provision (11(a), 12 and 18); all bills rendered by Gold Medal must be paid within 3 days; failure to make payment entitles Gold Medal to apply the security deposit to such payment; failure to restore the security deposit within one week is cause for termination (12).

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[52] The references are to the paragraphs of the Gold Medal contract.

The amount of security deposit and the procedure for paying it is fixed. The security deposit is equal to one week's gross sales. Failure to make a timely security deposit is ground for termination and authorizes Gold Medal to enter judgment on a note signed by the routeman in an amount equal to the security deposit (11d); Gold Medal can treat the security deposit as liquidated damages for breach of the provision against unauthorized purchases.

Gold Medal routemen are obligated to keep accurate books and records of all sales and purchases which are subject to inspection by Gold Medal (7). Routemen must purchase personal injury and property damage insurance on their trucks in certain amounts and name Gold Medal as an insured party. Gold Medal assists in getting such insurance and no routeman may use Gold Medal's name without insurance (10).

For two years after termination a Gold Medal routeman cannot sell or distribute any products to Gold Medal's customers (16); and no routeman can engage or become interested in any business which would interfere with the performance of his deliveryman duties (8).

The decisions of the Regional Director and the Board disclose other restrictive features held here to be objectionable and approved there. Sufficient appears, however, to demonstrate that the factors for independence here are infinitely greater than in *Gold Medal.* And, judged by the Board's own criteria: (1) the entrepreneurial aspects of the dealer's business including the "right of control"; (2) the risk of loss and opportunity for profit; and (3) the dealer's proprietary interest in his dealership, it is incontrovertible that the dealers here with their considerable investments and a potential market of over 10,000,000 persons for their advertised brand name products are infinitely better entitled to be called businessmen than the distributors in *Gold Medal.*

CONCLUSION

Schneider has in the exercise of its constitutional right openly bargained for and sold its distribution business to the distributors here involved. Schneider's good faith in so doing is not questioned. On the petition of certain of these distributors the Board has reached out to adjudge, contrary to the explicitly asserted intention of the parties, that they did not engage in a bargain and sale transaction whereby the distributors invested their capital for gain, but, on the contrary, have created an employer-employee relationship.

In making this determination, the Board has disregarded the Congressional mandate to give to the term employee its customary meaning, has violated the Constitutional rights of Schneider and the non-assenting distributors, has failed to apply existing law and to follow its own precedents. In determining that this trade association is a labor union, the Board has done violence to the term and has opened the back door to antitrust law evasion.

The Board's Decisions and Orders are wrong and should be set aside.

Respectfully submitted,

PROSKAUER ROSE GOETZ & MENDELSOHN
Attorneys for
Lorenz Schneider Co., Inc.
300 Park Avenue
New York, N. Y. 10022
Tel. (212) 593-9000

Of Counsel:

HOWARD LICHTENSTEIN

KALMAN I. NULMAN
295 Madison Avenue
New York, New York 10017

ADDENDA

A 1

Letter Dated December 7, 1973

(Letterhead of Proskauer Rose Goetz & Mendelsohn,
300 Park Avenue, New York, N. Y. 10022)

Writer's Direct Dial Number
593-9422

December 7, 1973

Mr. John C. Truesdale
Executive Secretary
National Labor Relations Board
Washington, D. C. 20507

Re: Lorenz Schneider Co., Inc.
Independent Routemen's Association
Case #29-CA-3459

Dear Sir:

We are enclosing for your information two letters we have recently received from two individuals who are or were members of the Independent Routemen's Association, the petitioner-charging party in the above case. It appears clear from these letter that the Board's processes are being used as a sham and subterfuge in an effort to force Lorenz Schneider to deal with the Independent Routemen's Association as a representative of a group of independent businessmen. We deem it necessary to call your attention to this fact in order that the Board may prevent its procedures from being so misused. We respectfully request that

you refer this matter to the Region for investigation and for a reopening of the proceedings.

Very truly yours,

MARVIN DICKER

STEVEN FISH, Esq.
Counsel for the General Counsel
National Labor Relations Board,
Region 29
16 Court Street
Brooklyn, New York 11241

MD:dsl
Encl.
cc: ROSENBERG, ROSENBERG & ROCKMAN
Independent Routemen's Assoc. Counsel
114 Old Country Road
Mineola, New York
bcc: KALMAN NULMAN, Esq.
MR. MILTON BROWN

A 3

Handwritten Statement, Undated, Signed by John Rosalia

Dear Mr. Price

I have been informed that Mr. Marc Rosenberg has written a letter to the N.L.R.B. with a copy to Internal Revenue Service claiming that the Lorenz Schneider Distributors including me, were employees and not self employed business men. Never did I authorize Marc Rosenberg to a letter in my behalf and I presently do not authorize such a letter. At an earlier meetting when Mr. Rosenberg was present the members stated that they were not interest in becoming employees. In fact they stated they wished to continue as being self employed business men. Mr. Harry Rosenberg assured us that we would continue to be self employed business men and his application to the N.L.R.B. was only a tool to get the L.S. Co. to bargin. He assured us that we would remain as self employed business men.

Yours Truly

John Rosalia

A 4

Letter Stamped Received December 3, 1973

HECTOR GALES
158 Arkansas Drive
Valley Stream, L. I., N. Y.

Mr. Prcie:

I attended several meetings last year of the Independent Routemans Association and at one of the meetings Mr. Harry Rosenberg, attorney for the association at the time, was telling us of one of his gimmicks to get Lorenz Schneider to negotiate with him for a new and better contract.

The gimmick was that he was taking our present contract to the N. L. R. B. and say that under the present contract we were employees. At this time the question came up by several of the men at the meeting, will we still own our routes and not be employees? Mr. Rosenberg said, "Don't worry, this is just a gimmick to get Lorenz Schneider to negotiate with us."

HECTOR GALES

[rubber stamp: Rec'd DEC 3 1973]

KENNETH S. PRICE jb

Letter Dated December 11, 1973

(Letterhead of Rosenberg, Rosenberg & Rockman,
114 Old Country Road, Mineola, N. Y. 11501)

CERTIFIED MAIL
RETURN RECEIPT REQUESTED

December 11th, 1973

Mr. John C. Truesdale
Executive Secretary
National Labor Relations Board
Washington, D.C. 20507

Re: LORENZ SCHNEIDER CO., INC.
INDEPENDENT ROUTEMAN'S ASSOCIATION
Case No. 29-CA-3459
Our File Number IRA-73-151

Dear Sir:

A copy of a letter dated December 7th, 1973, from Proskauer, Rose, Goetz & Mendelsohn by Marvin Dicker as attorney, addressed to you re: the above captioned matter, a copy of which is annexed hereto and made a part hereof, as well as the exhibits annexed thereto.

Mr. John Rosalia, is no longer a member of the Independent Routeman's Association, as he has entered into some sought of arrangement with the Lorenz Schneider Co., Inc., wherein Lorenz Schneider Co., Inc., with the help and assistance of the Borden Co., Inc., upon information and belief, has bought off Mr. Rosalia's route interest in exchange for Mr. Rosalia's disassociation with the Independent Routeman's Association, a duly certified union.

When Mr. Rosalia was a member of the Independent Routeman's Association he did authorize the officers thereof to speak on his behalf with the attorneys for the Association and to make decisions on behalf of the Association. The undersigned did not need Mr. Rosalia's authorization for any letter sent to the National Labor Relations Board as the undersigned was duly authorized by the officers of the Independent Routeman's Association to deal with the National Labor Relations Board on behalf of the entire Association.

Would you please bear in mind that Mr. Rosalia, will be the subject of an Unfair Labor Practice Charge, to be filed with the National Labor Relations Board, 29th Region, concerning himself, The Borden Co., and Lorenz Schneider Co., Inc., for interfering with union activities by the paying of monies to Mr. Rosalia, for his disassociation with the Independent Routeman's Association.

As to Hector Gales, I don't believe I've ever met Mr. Gales, in my life. He is not and has not been a member of the Independent Routeman's Association for at least one year and has consistently fought the Independent Routeman's Association, driving through its picket lines and working for and with the Lorenz Schneider Co., Inc., and the Borden Co., Inc. His self serving letter written to his dear friend Mr. Price, the executive vice president of Lorenz Schneider Co., Inc., should read with all the above in mind. He is also stating accusations of what a dead man, my late father, supposedly said and who unfortunately cannot be here to answer such statements.

Incidentally, it has been a number of months since the Unfair Labor Practice Charge, refusal to bargain, was

filed and as of this date I am still awaiting the outcome of the summary judgment proceeding of the 29th Region from your office.

Would you please be advised that the lives and fortunes of over twenty families rest with your speed and lack of speed in this matter and I believe it is incumbent upon you to act in all due diligence.

I suspect that on the basis of the two misleading letters enclosed with Mr. Dicker's letter of December 7th, 1973, that they are sought to being used for some type of re-opening of this matter so that the companies of Lorenz Schneider Co., Inc., and the Borden Co., Inc., can further stall the National Labor Relations Boards' inevitable result of the summary judgment proceeding, so as to starve out and/or buy out any further members of the union.

I suspect foul play in that they want to reopen these hearings and in doing so, stalling the decision on the motion for summary judgment for the Unfair Labor Practice Charge of refusing to bargain.

Would you please use your best offices to see that justice is done.

Very truly yours,

ROSENBERG, ROSENBERG & ROCKMAN

By: MARC A. ROSENBERG

MAR/jb

cc: STEVEN FISH, Esq.
MARVIN DICKER, Esq.
SAMUEL KAYNARD, Regional Director

B 1

Decision and Order of the Regional Director

UNITED STATES OF AMERICA

BEFORE THE NATIONAL LABOR RELATIONS BOARD

Case No. 4-RC-9600

GOLD MEDAL BAKING CO., INC.[1]

Employer

and

BREAD SALESMEN'S UNION LOCAL NO. 10, AFFILIATED WITH THE UNITED HEBREW TRADES OF PHILADELPHIA[1]

Petitioner

DECISION AND ORDER

[1]

Upon a petition duly filed under Section 9(c) of the National Labor Relations Act, a hearing was held before a hearing officer of the National Labor Relations Board. The hearing officer's rulings made at the hearing are free from prejudicial error and are hereby affirmed.

Pursuant to the provisions of Section 3(b) of the Act, the Board has delegated its powers in connection with this case to the undersigned Regional Director.

Upon the entire record in this case, the Regional Director finds:

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[1] The names appear as amended at the hearing.

1. The Employer is engaged in commerce within the meaning of the Act and it will effectuate the purposes of the Act to assert jurisdiction herein.

2. The labor organization involved claims to represent certain employees of the Employer.

3. No question affecting commerce exists concerning the representation of certain employees of the Employer within the meaning of Section 9(c)(1) and Section 2(6) and (7) of the Act, for the following reasons:

Employer, a Pennsylvania corporation with its principal office located in Philadelphia, is engaged in the manufacture and sale of bread, rolls, bagels and cakes. Petitioner seeks an election in a unit comprised of about 11 individuals it designates as driver-salesmen and employees. Employer contends these individuals are not its employees but are distributors and independent contractors excluded under Section 2(3) of the Act.

The record shows that for more than 50 years Employer distributed its baked products through employees it classified as driver-salesmen, for whom Petitioner was the bargaining representative. On December 31, 1970, however, the last in a long series of collective bargaining agreements between Employer and Petitioner expired. Employer and Petitioner bargained thereafter, but were unable to conclude a new agreement. Petitioner's negotiating committee suggested, and Employer decided, to convert to a distributorship system for the distribution of its products and pursuant thereto (between about March 6 and April 21, 1971) each driver-salesman was offered the opportunity to become a distributor and each executed a separate distributorship agreement with Employer. Although no compensa-

tion was paid to Employer therefor, each distributor obtained the exclusive right to sell Employer's products on the same route and to the same customers previously served as driver-salesman. He may, if he desires, add new customers within his route, and is free to sell his distributorship to whomever he pleases without sharing any of the proceeds with Employer, subject only to Employer's determination that the prospective buyer is reliable and dependable. One of the distributors sold his distributorship to a buyer for $12,000, which includes the price of the truck costing [2] $5,000. With the exception of one individual who purchased his truck elsewhere, each of the original distributors purchased his truck (which continue to display Employer's name) from the Employer, although not required to do so. The distributors are responsible for gas, oil, insurance, maintenance and repair of their vehicles. They garage them at their own cost and may use them for personal business, if they desire.

The record further shows that as driver-salesmen, the sought-after individuals received a salary plus commissions, together with vacations, hospitalization, and other fringe benefits. As distributors, however, these individuals purchase Employer's products daily and make payments therefor to Employer who bills them at 25% less than the suggested wholesale price, with a further 5% allowance for stale returns from chain stores. The distributors are not required to adhere to the suggested sale price, although most do, apparently for competitive reasons. The chain stores make payment of their account directly to Employer, but the distributors collect individually from the other customers who account for approximately 90% of the distributors' business. The distributor is responsible to Employer,

except in the case of chain stores, for all products purchased from Employer, and sustains a profit or loss based on the difference between the amounts paid to Employer and that collected from his customers. The distributor does his own bookkeeping, files his income tax as a self-employed person, is responsible for his own replacement in the event of illness or vacation, and must pay for his own hospitalization. He is not entitled to workmen's compensation or other fringe benefits to which he was formerly entitled as a driver-salesman. One distributor operates as a partnership.

I have carefully considered briefs submitted by both parties. The cases cited by Petitioner's Counsel merely recite the Board's applicable tests in determining the existence or non-existence of an independent contractor, and those cases do not distinguish nor compare the factual situation of the instant case. Moreover, I find that the facts enunciated in the cited cases are dissimilar and inapposite to the facts in the instant case. In these circumstances and based on the entire record, I find and conclude that the distributors are independent contractors, not employees. The determination of whether an individual is an independent contractor or an employee requires the application of the common law "right of control" test. Under this test, an employer-employee relationship exists where the person for whom services are performed reserves the right to control not only the end to be achieved, but also the means to be used in reaching such end. The resolution of this question depends on the facts of each case and no one factor is determinative. *Reisch Trucking and Transportation Co., Inc.,* 143 NLRB 953. In the instant case as in *Reisch,* there is bona fide and

absolute ownership of the trucks by the distributors, which gives rise to an inference of control over the manner of performance which is associated with the status of an independent contractor. Moreover, the parties here, as in *Reisch,* expressly indicated their intent in the distributorship agreements that the distributors were not to be employees of the Employer who withholds no income or social security taxes and does not pay workmen's compensation. Moreover, the shift from driver-salesman status to independent-distributor status shows clearly that both the Employer and distributors established an arrangement terminating the former Employer-employee relationship. Accordingly, I find that the distributors are independent contractors. *L. C. Sinor & Standard Industries,* 168 NLRB 467; *Deaton, Inc.,* 187 NLRB No. 102; cf. *Frito-Lay, Inc.,* 167 NLRB 73; *Frito-Lay, Inc.,* 178 NLRB 611.

ORDER

IT IS HEREBY ORDERED that the petition filed herein be, and it hereby is, dismissed.

Dated: May 9, 1972
at Philadelphia, Pa.

BERNARD SAMOFF
Regional Director, Region Four

Decision on Review of the National Labor Relations Board

199 NLRB No. 132

D—6775
Philadelphia, Pa.

UNITED STATES OF AMERICA

BEFORE THE NATIONAL LABOR RELATIONS BOARD

Case No. 4—RC—9600

GOLD MEDAL BAKING CO., INC.

Employer

and

BREAD SALESMEN'S UNION LOCAL NO. 10, affiliated with the UNITED HEBREW TRADES OF PHILADELPHIA

Petitioner

DECISION ON REVIEW

[1]

On May 9, 1972, the Regional Director for Region 4 issued a Decision and Order in the instant proceeding in which he dismissed the petition for an election among distributors of the Employer's bakery products on the ground that they are independent contractors. Thereafter, in accordance with Section 102.67 of the National Labor Relations Board Rules and Regulations, Series 8, as amended, the Petitioner filed a request for review of the Regional Director's Decision and Order on grounds that he made findings of fact which are

clearly erroneous and that he departed from officially reported precedent.

On June 29, 1972, by telegraphic order, the request for review was granted. The Petitioner and the Employer each filed a brief and supplementary brief on review.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

[2]

Upon the entire record in this case, including the briefs on review, the Board hereby affirms the Regional Director's Decision and Order, with the following additions:

The Employer, a Pennsylvania corporation with its principal office located in Philadelphia, is engaged in the manufacture and sale of bread, rolls, bagels, and cakes. For more than 50 years, the Employer distributed its bakery products to independent and chain store retailers by means of employees it classified as driver-salesmen. During this time, the Petitioner acted as bargaining representative for the driver-salesmen and negotiated successive collective-bargaining agreements with the Employer, the last of which expired on December 31, 1970.

In the course of negotiations for a new agreement, the parties in February 1971 for the first time discussed the feasibility of creating distributorships for the driver-salesmen. Discussion proved fruitful and the Employer's attorney was instructed to draft a distributorship agreement. Between March 6 and April 21, 1971, the Employer asked each of the 11 driver-salesmen to execute the distributorship agreement which had been drafted; all of them did so and immediately commenced operating under their agreements.

By letter dated April 9, the Employer's attorney advised the Petitioner that the Employer would "continue to recognize [it] as the exclusive bargaining agent for all driver employees of the company, including distributors." Thereafter, the parties engaged in negotiations until November when the Employer broke off the negotiations on the ground that the distributors were independent contractors. On December 7, 1971, the Petitioner filed with the Board unfair labor practice charges alleging refusal to bargain by the Employer, but [3] withdrew the charges on January 31, 1972, the same day that it filed the instant petition.

Under the terms of the distributorship agreements, the distributor is given the exclusive right to sell the Employer's products to customers of the Employer whose names are listed on an appendix to the agreement;[1] distributor agrees to buy all of his needs of bakery goods from the Employer; distributor agrees to pay the prices established by the Employer and will be allowed a 5-percent credit for stale returns from certain named chain stores; distributor is required to pay for his purchases of the Employer's products within 3 days of receiving the statement for the previous week's purchases; distributor may purchase from other bakeries only such items as the Employer agrees to, except for cakes and pastries which distributor can purchase without the Employer's prior approval; distributor agrees to keep accurate records of all purchases and sales and make them available for inspection by the Employer at reasonable times; distributor agrees to not engage in any other business which would interfere with the sale or distribution of the Employer's products to its customers; the Employer has the

[1] The record shows that each distributor was assigned the same customers he had serviced as a driver-salesman.

right to assign additional customers to a distributor as long as such additional assignments are located within a reasonable distance of the distributor's present primary area of distribution; distributor is required to furnish his own truck and maintain it in good condition and repair and with a clean appearance at all times; distributor agrees to insure the truck to the minimum amounts specified and the Employer shall be named as one of the parties insured; distributor agrees to deposit the equivalent of 1 week's gross sales as a security deposit; distributor agrees to a specified [4] amount as liquidated damages in the event that he should purchase products from other than the Employer without the Employer's written consent; the parties agree that the distributor is a self-employed independent contractor; distributor agrees, upon termination of the agreement, not to work for a competitor of the Employer selling or servicing the same customers for a period of 2 years; distributor agrees to make arrangements for a substitute during illnesses or emergencies and if he fails to do so, the Employer is authorized to provide such service and charge it to the distributor; the Employer has the absolute right to terminate the agreement upon 1 week's notice for breach or default, and it is considered a breach for the distributor, *inter alia,* to fail to sell or service all of the customers assigned to him in a diligent manner or cause the loss of any such customer; distributor shall not exchange customers with other distributors except upon the prior approval of the Employer and then there shall be no payment made for the exchange; the Employer shall not be held liable to the distributor for the loss of any customers; during the term of the agreement distributor may assign or sell the exclusive rights he has, subject to the prior written approval of the Employer and further providing that purchaser enter

into a new agreement with the Employer under the same terms and conditions; the Employer has the absolute right to terminate its business upon 2 weeks' notice to the distributor; the parties agree to binding arbitration in the event of any dispute concerning interpretation or application of the agreement; and the distributor is to be paid a commission of 25 percent.

The practice under the distributorship agreements has been for the distributors to purchase the Employer's products daily at 25 percent less than the Employer's suggested resale price, with a further 5-percent discount for [5] sales made to chain stores as an allowance for stale returns. The distributors are not required to adhere to the suggested resale price, and some distributors have given discounts to certain customers or have charged customers more than the suggested resale price. Except for sales to chain stores, which account for approximately 10 percent of the distributor's business, the distributors make their own collections, give credit, and bear the loss if a customer fails to pay. The distributors can add customers to their routes if they so desire, and the record shows that some of the distributors have done so. The distributor's gross income is determined by the difference between what he pays the Employer for the products he purchases and that which he collects from his customers.

The distributors own, maintain, insure, and garage their own trucks, are not supervised in the servicing of their routes, determine their own hours, do their own bookkeeping, file their own income tax as self-employed individuals, are responsible for their own replacement in the event of illness or vacation, and are entitled to none of the fringe benefits they formerly received as driver-salesmen. The distributors are not required to participate in promotional

programs instituted by the Employer, to attend meetings, to wear special clothing, or to keep the Employer's name painted on their trucks.[2] Pursuant to the terms of the distributorship agreement, one distributor sold his right under the distributorship to a third party, with the approval of the Employer, for the sum of $7,000.[3]

[6] It is well established that the appropriate test to apply in determining whether certain individuals are independent contractors or employees is the common law of agency right-of-control test.[4] Under this test, an employer-employee relationship exists when the employer reserves the right to control not only the ends to be achieved, but also the means to be used in achieving such ends. On the other hand, where control is reserved only as to the result sought, an independent contractor relationship exists. Moreover, the Board has made it clear that application of the test is not a "perfunctory exercise," but demands a balancing of all the evidence relevant to the relationship.[5]

In the instant case, we find, in agreement with the Regional Director, that the distributors involved are independent contractors. Contrary to the Petitioner, we do not believe that the provisions of the distributorship agreements, detailed above, impose the types of restrictions on the distributors which, without more, would require a finding that the Employer has reserved to itself control over the means by which the distributors sell and deliver its

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[2] The record shows that, although all but one of the distributors have the Employer's name painted on their trucks, the Employer does not require it.

[3] He also sold his truck to the individual for $5,000.

[4] *N.L.R.B.* v. *United Insurance Co.*, 390 U.S. 255.

[5] *National Freight, Inc., Federal Freight, Inc., and Sun Transportation, Inc.*, 153 NLRB 1536, 1538-39.

bakery products. Further, as emphasized by the Regional Director, despite the earlier history of representation by the Petitioner, the Employer and the distributors in the distributorship agreements expressly stated their intention to create an independent contractor relationship.

Moreover, other facts set forth above support the Regional Director's conclusion that such a relationship has been created. Thus, the fact that the [7] distributors own and maintain their own trucks at their own expense gives rise to an inference of control over the means by which the Employer's products are distributed. Although the Employer suggests prices at which the products it produces may be resold to retailers, it does not require the distributors to adhere to such prices, and on occasion the distributors have varied from such suggested resale prices as they have seen fit. Notwithstanding the fact that the Employer retains control over the customer lists, the distributors are given a proprietary interest of substantial value in their distributorships which they can sell to a third party. Moreover, the record shows that the distributors carry out their responsibilities under the agreement without supervision by the Employer. As indicated above, the distributors can add customers to their routes if they so desire, and some have done so. Although the agreement specifies that the distributors shall keep accurate records of all purchases and sales and make them available to the Employer for inspection, all recordkeeping is in fact done by the distributors themselves. They make their own collections (except for chain stores) and if they extend credit, assume the risk of loss for nonpayment. Finally the distributors no longer receive fringe benefits from the Employer.

Although the earlier bargaining history covering the period when the Employer distributed its products through

its own employees, as well as the restrictions contained in the distributorship agreements, are factors which militate in favor of a finding that the distributors are employees, we believe for the reasons stated that the record on balance supports the conclusion that the Employer has not retained significant control of the means used by the [8] distributors in selling the Employer's products, and that an independent contractor relationship has in fact been created.[6]

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[6] *Pure Seal Dairy Company*, 135 NLRB 76. Cf. *The Herald Co.*, 181 NLRB 421, enfd. 444 F.2d 430 (C.A. 2) (where the employer maintained control over the distributors' earnings through extra-contractual compensation, required its distributors to participate in a myriad of company activities, including extensive promotional campaigns, and supervised the resolution of many of its distributors' delivery problems); *Meyer Dairy, Inc., a subsidiary of Milgram Food Stores, Inc.*, 178 NLRB 454, enforcement denied 429 F.2d 697 (C.A. 10) (where the distributors were required to maintain certain health and cleanliness standards to the satisfaction of the employer and promote the employer's products); *Frito Lay, Inc.*, 178 NLRB 611, and 167 NLRB 73 (where the employer actively engaged the distributors in soliciting new outlets, assisted the distributors in servicing their routes during emergencies, helped them with such things as racking and the resolution of route problems; and the distributor retained no proprietary rights in the route which he could sell to a third party); *Carnation Company*, 172 NLRB No. 215, enforcement denied 429 F.2d 1130 (C.A. 9) (where the distributors were required to install and maintain at their own expense promotional material provided by the employer, and the employer required the distributors to paint and maintain their vehicles to its satisfaction); *News Syndicate Co., Inc.*, 164 NLRB 422 (where the distributors' income was largely controlled by the employer and the distributor retained no proprietary interest in his territory); *Pepsi-Cola Bottling Company of Michigan, Grand Rapids Division*, 156 NLRB 80 (where the employer controlled the size of the distributor's territory and could transfer customers to other distributors without compensation; and the distributors retained no proprietary interest in their routes which they could assign to third parties); *Squirt-Nesbitt Bottling Corp.*, 130 NLRB 24 (where the employer required the distributors to actively engage in promotional activities, to paint and maintain their trucks in a specified manner, to wear uniforms, and attend periodic meetings called by the employer; and the employer retained the right to solicit orders in the distributors' territories).

Dated, Washington, D.C.

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EDWARD B. MILLER, Chairman

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RALPH E. KENNEDY, Member

.....

JOHN A. PENELLO, Member

NATIONAL LABOR RELATIONS BOARD

(SEAL)

B 15

[1]

AGREEMENT

This Agreement is made and entered into this day of , 1971 by and between hereinafter referred to as "DISTRIBUTOR", and GOLD MEDAL BAKING COMPANY, Philadelphia, Pennsylvania, hereinafter referred to as "CORPORATION".

WITNESSETH THAT

WHEREAS, CORPORATION is in the business of baking, selling and distribution of and/or all kinds and types of Jewish rye bread, pumpernickle, white breads of various kinds, bagels, rolls and similar products, hereinafter referred to as "PRODUCTS", and

WHEREAS, CORPORATION, has, over many years, built up and established an extensive trade therein, and

WHEREAS, CORPORATION, has over the years established a following amongst various restaurants, institutions, stores, groceries, delicatessens and retail chain stores who have been purchasing from CORPORATION, the said PRODUCTS, and

WHEREAS, DISTRIBUTOR is desirous of becoming a distributor for the sale of said PRODUCTS TO CORPORATION'S customers as hereinafter designated.

NOW, THEREFORE, for and in consideration of the mutual promises and agreements herein contained, the parties hereto agree as follows:

[2] 1. CORPORATION hereby grants DISTRIBUTOR the exclusive right to sell said PRODUCTS to CORPORATION'S customers as set forth in the list attached hereto, marked Exhibit "A" and made a part hereof by reference thereto, designating the names and addresses of CORPORATION'S customers to be served by DISTRIBUTOR, upon the terms and conditions hereinafter contained.

2. For and during the term of this agreement, provided DISTRIBUTOR is not in default hereunder, he shall have the exclusive right to sell said PRODUCTS to CORPORATION'S customers, set forth in said Exhibit "A" hereto attached.

3. (a) DISTRIBUTOR agrees that for and during the term of this agreement, he shall purchase from CORPORATION only, all of his needs and requirements of said PRODUCTS, (except as set forth and modified in Paragraph 6 hereinafter contained), for resale by him to CORPORATION'S said customers which PRODUCTS, CORPORATION agrees to sell to DISTRIBUTOR. CORPORATION agrees to sell to DISTRIBUTOR all of his needs and requirements of said PRODUCTS so long as DISTRIBUTOR is not in breach of this agreement and so long as CORPORATION produces and is able to produce said PRODUCTS.

(b) CORPORATION shall not be held responsible for any loss or damage caused by delay or failure to perform hereunder, when such delay or failure is due to fires, strikes, acts of God, acts of the public authorities, shortages of materials, breakdowns or delays or defaults caused by public carriers or caused by other reasons beyond CORPORATION'S control. In such events CORPORATION re-

serves the right to sell to DISTRIBUTOR proportionate amounts of such PRODUCTS, if any available, in accordance with the [3] amount of PRODUCTS available.

4. DISTRIBUTOR shall pay to CORPORATION for these PRODUCTS, CORPORATION'S established prices, as established by CORPORATION from time to time. DISTRIBUTOR shall not be allowed any credit for return of stale bread or any other baked products except an allowance of five per cent (5%) resulting from sales to certain retail stores that are part of a chain, which shall include Penn Fruit, Food Fair, Acme and A & P only.

5. All purchases made by DISTRIBUTOR from CORPORATION shall be paid for by DISTRIBUTOR to CORPORATION within 3 days of the date upon which statements are rendered, for the purchases made the preceding week.

6. Notwithstanding anything to the contrary herein contained, DISTRIBUTOR may purchase only packaged cakes and pastries from other bakeries, and such other items of PRODUCTS as shall be agreed upon between the parties hereto in writing as the occasion may from time to time require.

7. DISTRIBUTOR agrees that he shall keep accurate books and accounts of all of the purchases and sales made by him which books and records shall be available to a duly authorized representative or employee of CORPORATION, for examination at all reasonable hours. For purposes of this paragraph, present record keeping practices of DISTRIBUTOR are deemed to satisfy these requirements.

8. DISTRIBUTOR agrees that for and during the term of this agreement or any renewal term or terms hereunder, [4] he shall not engage in or become interested in any other business or calling which would interfere with the sales and distribution of CORPORATION'S PRODUCTS to its customers.

9. CORPORATION shall have the right to add additional customers to the list set forth in Exhibit "A" attached hereto provided such customers are within a reasonable distance of the DISTRIBUTOR'S present primary area of sales, and DISTRIBUTOR agrees that he will sell the aforementioned PRODUCTS to said customers under all of the terms and conditions as herein contained, as though they were originally set forth in Exhibit "A".

10. DISTRIBUTOR shall furnish his own truck required and necessary for the proper conduct of the sales and distribution under this agreement, at his own cost and expense, and agrees that he shall maintain the truck in good order, condition and repair, and that it shall have a clean and proper appearance at all times. All costs and expenses of servicing, maintaining and operating the said truck shall be at the sole cost and expense of the DISTRIBUTOR.

DISTRIBUTOR agrees that immediately upon the execution of this agreement, he will obtain insurance policies, for his truck from a reputable and established insurance company or companies licensed to do business in the Commonwealth of Pennsylvania, for property damage in the minimum limits of $10/20,000.00 and personal injury coverage in the minimum limits of $100/300,000.00 and CORPORATION shall be included and named as a party

insured. Certified copies of the [5] insurance policies shall be delivered to CORPORATION immediately upon the execution of this agreement. Such insurance shall be paid for by DISTRIBUTOR and DISTRIBUTOR shall maintain such insurance during the entire term of this agreement. Should DISTRIBUTOR be unable to obtain the levels of insurance specified herein at any time, the CORPORATION agrees to assist him in locating such insurance. If the DISTRIBUTOR is still unable to obtain the insurance coverage specified herein, CORPORATION will accept whatever maximum level of insurance the DISTRIBUTOR can obtain provided that the CORPORATION'S name is removed from any vehicle operated by the DISTRIBUTOR in connection with his business with the CORPORATION and further provided that no reference shall be made to the CORPORATION on any delivery vehicles of the DISTRIBUTOR, or in any way by DISTRIBUTOR himself.

11. DISTRIBUTOR hereby agrees that he shall deposit with CORPORATION, the sum of one week's gross sales, as security for the payment of all purchases made by him from CORPORATION and/or for such other damage or loss that CORPORATION may suffer or incur as a result of any breach or default hereunder. CORPORATION shall have the right at any time and all times during the term of this Agreement to apply said security deposit or as much thereof as shall be necessary against DISTRIBUTOR'S unpaid bills due to CORPORATION upon the expiration of the three (3) day period referred to in paragraph 5 above. DISTRIBUTOR agrees to replace such sums immediately upon their use so that at all times there shall be on deposit with CORPORATION an amount equal to one (1) week's gross sales of the DISTRIBUTOR.

[6]

DISTRIBUTOR shall:

(a) Deposit the sum of Dollars with CORPORATION at the time of the execution of this agreement, and

(b) Deposit with CORPORATION sums of no less than
LBL SK *$50.00* per week, until there shall have been deposited with
LBL SK CORPORATION the total sum of *$2500.00* Dollars. The first deposit shall be made with CORPORATION, one week after the execution of this agreement and the next such deposit on the Tuesday following, and such sums shall continue to be deposited each and every Tuesday thereafter until DISTRIBUTOR has deposited the entire sum of Dollars. Time for the payments of the sums hereunder shall be of the essence of this agreement. If the DISTRIBUTOR shall fail to make any three payments required hereunder, or replace any sums applied by CORPORATION hereunder, it shall be a default hereunder and CORPORATION shall have the option to terminate this agreement immediately upon such default.

DISTRIBUTOR shall deposit with CORPORATION, at the time of the execution of this agreement, a note containing a confession of judgment and payable on demand,
LBL SK in the sum of *$2500.00* Dollars, to be held by CORPORATION until DISTRIBUTOR shall have deposited the entire sum of Dollars required hereunder, at which time said note shall be returned to DISTRIBUTOR.

However, in the event that DISTRIBUTOR shall be in default in failing to make any three payments into the [7] security account and/or shall have committed other defaults or breaches hereunder and DISTRIBUTOR has

failed to cure them upon one (1) week's notice, CORPORATION shall have the absolute right to terminate this Agreement, to confess judgement on said note forthwith, and to proceed with such further action thereon or otherwise to reimburse CORPORATION for such amount or amounts as may be due to it by DISTRIBUTOR.

12. In the event that DISTRIBUTOR shall purchase any PRODUCTS from others than CORPORATION, without the written consent and approval of CORPORATION, such act or acts shall be a breach of this Agreement, and inasmuch as this breach will cause serious and substantial damage to CORPORATION and because it will be difficult if not impossible to prove the amount of such damage, DISTRIBUTOR hereby agrees that in the event of such breach on his part CORPORATION shall receive, as maximum liquidated damages, the amount of the security deposit by the DISTRIBUTOR and in no event less than $1,000; such sum being agreed upon by the parties hereto as the amount which CORPORATION will be damaged by this breach on the part of the DISTRIBUTOR.

CORPORATION may apply the security deposit (mentioned hereinabove), or so much thereof as shall be in its possession, and DISTRIBUTOR shall forthwith pay to CORPORATION any deficit if the security deposit at that
LBL SK time be less than *$2500.00* Dollars; and in such event DISTRIBUTOR shall immediately deposit with CORPORATION such sums as shall be required to restore the security
LBL SK deposit to the sum of *$2500.00* Dollars. Failure to do so within one (1) week shall be a default and a breach of this Agreement.

It is strictly understood and agreed upon the recurrence of such breach by DISTRIBUTOR, in addition to further liquidated damages, CORPORATION shall have the absolute right to terminate this Agreement.

13. It is further agreed between the parties hereto that for each additional One Hundred ($100.00) Dollars increase in purchases made by DISTRIBUTOR, resulting from increase in prices and/or the addition of new customers DISTRIBUTOR shall deposit with CORPORATION for each and every such increase of One Hundred ($100.00) Dollars in purchases, additional sums of One Hundred ($100.00) Dollars, as security, upon demand made therefor by CORPORATION. Such additional deposits shall be held by CORPORATION under the same terms and conditions of the original security deposit, and thereafter the security deposit shall be maintained in such larger sum.

14. In the event DISTRIBUTOR shall fully and faithfully comply with all of the terms, obligations, covenants and provisions of this agreement, the security deposits or any balance thereof in the possession of CORPORATION, after the termination of this agreement and after the payment of all monies due by DISTRIBUTOR to CORPORATION, shall be returned to DISTRIBUTOR.

15. It is strictly understood and agreed between the parties hereto that DISTRIBUTOR is a self-employed independent contractor, and is not an agent or employee of CORPORATION, and he has no authority or power, express or implied, to do or perform any act or thing or to

make any warranty or [9] representation or promise to make a committment of any character which will be binding upon CORPORATION.

16. DISTRIBUTOR hereby agrees that the goodwill created over the years amongst CORPORATION'S customers by CORPORATION, in the sale of its products to its customers is an invaluable asset of CORPORATION. Therefore, in consideration of the foregoing premises, and the mutual promises, and agreements herein contained and other good and valuable consideration, receipt whereof is hereby acknowledged by DISTRIBUTOR, DISTRIBUTOR hereby expressly promises and agrees that for a period of two (2) years immediately following the termination of this Agreement, for any reason whatsoever, DISTRIBUTOR shall not, either as principal, disclosed or undisclosed, or on behalf of or in conjunction with any other person, firm, partnership, company or corporation, either as agent, distributor, employee, partner, officer, director, consultant or in any other capacity, directly or indirectly, sell or distribute to CORPORATION'S customers, contained in Exhibit "A" attached hereto and/or any additions thereto, any of the PRODUCTS or any similar PRODUCTS baked, manufactured, produced and/or distributed by CORPORATION which are and have been distributed by DISTRIBUTOR under the terms of this Agreement.

17. If DISTRIBUTOR, because of illness or emergency, cannot personally attend to and service CORPORATION'S customers listed in Exhibit "A" hereto attached and any additions thereto, then during such periods he agrees to make other adequate arrangements and provisions therefor at his own [10] cost and expense, and if he is unable

or fails to do so, CORPORATION is hereby authorized, in its discretion, to provide such service to the extent available to CORPORATION at the cost, expense and risk of DISTRIBUTOR, such cost not to exceed an amount agreed upon in advance by the DISTRIBUTOR and CORPORATION.

18. CORPORATION shall have the absolute right in its discretion to terminate this agreement at any time upon one (1) week's written notice to DISTRIBUTOR for default or breach herein and for the following reasons all of which shall also be defaults and breaches hereunder:

(a) DISTRIBUTOR'S failure to faithfully keep and perform any of the terms, covenants, agreements and conditions herein contained; and/or

(b) Any dishonesty of the DISTRIBUTOR in his dealings with CORPORATION or with any of CORPORATION'S customers; and/or

(c) DISTRIBUTOR becoming insolvent, or the filing by him of a voluntary petition in bankruptcy or by the filing against him of an involuntary petition in bankruptcy, or by his general assignment for the benefit of his creditors; and/or

(d) DISTRIBUTOR'S failure to sell to or service all of CORPORATION'S customers as listed in Exhibit "A" hereto attached and/or any additions thereto properly and with due diligence or cause the loss of any said customers; and/or

[11] (e) The death of DISTRIBUTOR except that if within thirty (30) days from the date of said death the personal representative of DISTRIBUTOR'S

estate shall obtain a purchaser under the terms and conditions set forth in Paragraph 24, hereinafter contained.

19. It is agreed that CORPORATION'S failure to enforce any defaults hereunder shall not be considered a waiver thereof, and that CORPORATION shall have the right to proceed hereunder in the event of any subsequent defaults, whether of a similar nature or otherwise. All of the remedies given to it by law and equity shall be cumulative and concurrent. All rights and remedies given hereunder to CORPORATION shall survive the termination of this agreement.

20. Upon any termination hereunder for any reason whatsoever there shall be a final settlement between DISTRIBUTOR and CORPORATION at which time DISTRIBUTOR shall pay to CORPORATION such monies then due to CORPORATION and DISTRIBUTOR'S obligations provided for in paragraph 16 shall survive any termination of this agreement.

21. Should DISTRIBUTOR lose any of the customers on his route, he shall have the right to exchange said customer with another Distributor only upon the prior approval of the CORPORATION and provided that no monies are exchanged among Distributors in consideration of such arrangements.

22. CORPORATION shall not be responsible or liable to DISTRIBUTOR for the loss of any customers.

23. So long as CORPORATION shall continue in business and provided DISTRIBUTOR faithfully performs

and carries out [12] all the terms hereof, this agreement shall continue in full force and effect until terminated and cancelled by CORPORATION for just cause and for any breach or default as herein provided.

24. During the term of this agreement if DISTRIBUTOR shall not be in default hereunder, he may assign or sell the exclusive rights granted herein, which assignment or sale shall be subject to the prior written approval and consent of CORPORATION, which approval and consent shall not be unreasonably withheld, and further conditioned that the assignee and/or purchaser shall enter into a new agreement with CORPORATION in the same form and with the same terms and conditions herein contained.

25. Notwithstanding anything to the contrary herein contained it is specifically agreed between the parties hereto that CORPORATION shall have the absolute right at any time hereafter to dissolve the CORPORATION, liquidate its assets, and wind up its business only upon two (2) weeks' minimum prior notice to the DISTRIBUTOR. In such event this agreement shall forthwith end and terminate and the parties hereto shall then be released from all liabilities, rights, duties and obligations hereunder except the obligation to pay any indebtedness owing by each to the other party hereto at the time of termination.

26. Any dispute concerning the interpretation or application of this agreement shall be discussed by the parties hereto. If such dispute is not adjusted to the mutual satisfaction of both parties, the dispute shall be [13] reduced to writing and either party may submit the dispute to arbitration in accordance with the procedures of the American

Arbitration Association Labor Disputes Rules for a final and binding decision. The fee of the arbitrator selected through the processes of the American Arbitration Association shall be borne equally by the DISTRIBUTOR and CORPORATION. The written award of the arbitrator shall be final and binding upon the parties to this agreement. The arbitrator shall have no power to add to, subtract from, modify or amend any provision of this Agreement.

LBL SK 27. Effective *April 17, 1971,* the commisison to be paid to DISTRIBUTOR shall be 25% with an allowance for stale as provided in paragraph 4. above.

28. The parties, intending to be legally bound hereby, make this agreement binding upon their heirs, executors, administrators, successors and assigns.

IN WITNESS WHEREOF, the parties hereto have hereunto caused these presents to be executed the day and year first above written.

GOLD MEDAL BAKING COMPANY

By: /s/ L. B. Lipkin
L. B. Lipkin, Vice President

/s/ Seymour Kipnis
Distributor

STATE OF NEW YORK,
COUNTY OF NEW YORK, ss.:

Joseph Boselli , being duly sworn, deposes and says, that on the 30th day of September 1974 , at 2:30 o'clock P. M. he served the annexed Reply Brief for Lorenz Schneider Co. Inc. in RE: Lorenz Schneider Co. Inc. v. National Labor Relations Board.

upon Elliott Moore, Esq. Deputy Associate General Counsel

Esq(s)., Attorney(s)

for Respondent

by depositing 2 true copies

thereof in a Post Office Box regularly maintained by the Government of the United States and under the care of the Postmaster of the City of New York at Village Station, New York, N. Y. 10014, enclosed in a securely closed wrapper with the postage thereon prepaid, addressed to said attorney(s) at (his/their) office

National Labor Relations Board, Washington, D.C. 20570, Attn.Peter Carre, Esq. Litigation Services

that being the address designated in the last papers served herein by the said attorney.

Joseph Boselli

Sworn to before me this 30th

day of September 1974

Michael H. Sohn

MICHAEL H. SOHN
Notary Public, State of New York
No. 41-0100710
Qualified in Queens County
Commission Expires March 30, 1975